REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 28 OF 2012

IN THE MATTER OF: NUCLEAR INVESTMENTS LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT

(CAP. 486 LAWS OF KENYA)

AND

IN THE MATTER OF: A PETITION BY MINORITY

SHAREHOLDERS UNDER

THE PROVISIONS OF

SECTION 135, 211, 212, 218

AND 219 OF THE COMPANIES ACT

BETWEEN

1. **MARTIN NJUGUNA KURIA ……..…… 1ST PETITIONER**
2. **SAMUEL MWAURA GICHUMBU ……... 2ND PETITIONER**
3. **STEPHEN MAGI KARITU ……..…… 3RD PETITIONER**
4. **JOHN GITHARI NDUNGU ……...…….. 4TH PETITIONER**
5. **PETER NDUNGU NJUGUNA ….……...……. 5TH PETITIONER**
6. **STEPHEN MWANGI GICHUHI ……..…….. 7TH PETITIONER**
7. **JOHN NJOROGE CHEGE ……..……..…… 8TH PETITIONER**
8. **DOMINIC MBUGUA GATHEA ……....……..….. 9TH PETITIONER**
9. **MARY KARANJA ……... 11TH PETITIONER**
10. **RACHAEL KARANJA …… 12TH PETITIONER**
11. **PETER NDEANI ……..… 13TH PETITIONER**
12. **TARZAN IKAMA MBUGUA …… 14TH PETITIONER**
13. **PETER MWANIKI MBUGUA ……. 16TH PETITIONER**

VERSUS

NUCLEAR INVESTMENTS LIMITED …… 1ST RESPONDENT

NAFTALI GICHOBI MUTUGI ……..…….. 2ND RESPONDENT

MOSES NOTTINGHAM MWANGI ……..……. 3RD RESPONDENT

JOHN MAINA KIGUNDU ……..…… 4TH RESPONDENT

STEPHEN NJOROGE KIBOI ……..……. 5TH RESPONDENT

RUEL NDUNGU KINYANJUI ……..…. 6TH RESPONDENT

JOHNSON MUNENE MURIUKI ……..… 7TH RESPONDENT

FRANCIS MWANGI MWENDIA ……..... 8TH RESPONDENT

R U L I N G

1. There are 3 Applications pending before this Court for determination. The first in time is the Respondent's Notice of Motion dated 3rd May 2013 seeking an injunction order to issue restraining the Petitioners from advertising their Petition pending the hearing and determination of the Application and also to strike out the Petition herein. The second Application is that of the Petitioners dated 18th June 2013 also seeking a temporary injunction to restrain the second, third, fourth, fifth, sixth, seventh and eighth Respondents from conducting a Special General Meeting of the company Nuclear Investments Ltd (hereinafter called "the Company") on the 19th June 2013. The third Application is again filed by the Petitioners dated 10th September 2013. That Application seeks two main prayers firstly that the Respondents be restrained from denying the Petitioners access and/or use of the first Respondent's facilities including the bus terminals, car parks and petrol stations belonging to it. Secondly, it seeks orders that the first Respondent through the second, third, fourth, fifth, sixth, seventh and eighth Respondents do pay to the Petitioners the dividends and bonuses payable to shareholders of the Company for the years ending December 2011 and 2012.
2. It would seem sensible to this Court that the three Applications be dealt with in date order. The Respondents' Application by way of Notice of Motion dated 3rd May 2013 principally seeking to strike out the Petition herein, was brought under the provisions of **Order 2 Rule 15 (1) b, c & d and (3)**, **Order 40 Rule 2 (1)** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010* as well as **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Rules Nos. 203 and 23** of the *Companies (Winding-up) Rules 1983*. The Application was predicated on a number of grounds as follows:

> **"a) The advertisement of the petition would cause enormous injury and damages to the company/applicant herein.**
>
> **b) The petition was not been served upon the company.**
>
> **c) The petition is lodged with ulterior motive to put pressure on the company.**
>
> **d) The petition is scandalous, frivolous and vexatious.**
>
> **e) the petition is an abuse of the process of the court.**
>
> **f) The petition was brought with malicious intention to blackmail the company to pay out to the petitioners unreasonable money demanded.**
>
> **g) The Relief under Sec 211 sought is not available to the petitioner and determination of this petition.**

h) The company accepted to the petitioner disposing of their shares in the company.

i) The petitioners declined to receive payment for their proceeds of sale of their share transfers and the company is holding the same in trust on their behalf.

j) The company is solvent.

k) It cannot be just and equitable to mind up a company over a complaint which can be effectively settled in an alternative manner.

l) The petitioners has lost interest in suit which keep hanging on the applicants head with uncertianity of unending.

m) That is only meet and just that this application be allowed as prayed".

3. The Supporting Affidavit to the Respondents' said Notice of Motion was sworn by **Ruel Ndungu Kinyanjui**, the 6th Respondent herein, dated 3rd May 2013. The deponent explained that the genesis of the dispute had commenced when the Petitioners herein issued a notice to the Company seeking the transfer of their shares therein. Under *Article 9 (ii)* of the *Articles of Association* of the Company, the notice should specify the sum that the proposing transferor fixes as the fair value for his/her shares and shall constitute the Company as his/her agent for the sale of the shares to any member of the Company willing to purchase the same. He went on to say that the said notices were received by the Company and were accepted to transfer the Petitioners' shares. That acceptance was promptly communicated to the Petitioners by the advocates for the Company. The deponent maintained that the notice of transfer of shares was irrevocable and once the Company received the notice, the Petitioner concerned automatically ceased being a member or shareholder of the Company. The deponent went on to point out that under Article 9 (iv), where there was a difference between seller and buyer as to the fair value of the share, the Auditor for the time being of the Company would certify in writing, the sum that he considered to be the fair value of the share. He noted that the Company's auditor had prepared a report which he annexed to the Supporting Affidavit and it certified that the fair value of one share in the Company was Shs. 655,772/= as at 14th September 2012. Mr. Kinyanjui stated that this share value had proved unacceptable to the Petitioners although under cover of a letter dated 24th September 2012, the share consideration for the petitioners' shares as per the auditors' valuation had been forwarded to their advocates by the Company's advocates. In the deponent's view the Petition herein was brought in bad faith to the extent that one of the Petitioners (the 15th) had died and a copy of his Death Certificate was attached. It was Mr. Kinyanjui's view that the Petitioners had ceased being members/shareholders of the Company immediately after they had issued the irrevocable transfer of share notice.
4. The first Petitioner/Applicant's swore an undated Replying Affidavit to the said Application of the Respondents but filed herein on the 4th July 2013. **Order 19 rule 7** of the *Civil Procedure Rules, 2010* provides that:

"… the Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or <u>other irregularity in the form thereof or on any technicality</u>." (Emphasis mine).

It seems from this provision that the Court has a discretion as to whether to accept the first Petitioner's Affidavit or otherwise into evidence. As I consider it pertinent to the Respondents' Application, I have noted its contents. The first Petitioner maintained that he was the lawful and registered owner of 165 shares in the Company. He maintained that the Petitioners had not intended nor indeed tried to advertise the Petition. He maintained that the Petitioners were oppressed shareholders who had a right to issue notices to the Company, in accordance with the Articles of Association, for the sale of their shares to willing buyers. He maintained that such was desiring sellers/willing buyers situation where negotiation as to the fair value of the share price should take

place. As there had been no negotiation, no sale of shares had taken place and consequently the Petitioners were still shareholders in the Company and consequently entitled to bring this Petition. The deponent criticised the work of the auditor who had failed to go to the ground to ascertain the value of the various assets owned by the Company. He noted that share proceeds cheques were received through the advocates on 25th September 2012 but were returned to the Company's advocates on the same day. He felt that counsel was misleading this Court, misrepresenting the facts that the Petitioners had accepted payment. Counsel should confirm to the Respondents and indeed this Court that he is still holding the share proceeds money. He noted that the Respondents had gone ahead to issue/award dividends of Kenyan shillings 100,000/-to shareholders together with a bonus of Shs. 20,000/-for three consecutive years denying the same to the Petitioners.

5. The Respondents' Submissions in relation to their Notice of Motion dated 3rd May 2013 were filed herein on 23rd September 2013. They summed up the prayers as sought in the Petition as well as outlining the Petitioners' complaints as to the infringement of their rights and oppression. They outlined the proceedings to date noting that this Court had ordered that the Respondents' Notice of Motion dated 3rd May 2013 should be disposed of together with the Petitioners' Notice of Motion dated 18th June 2013. They then set out the brief facts along the lines of the Affidavit in support of the Application dated 3rd May 2013. The submissions went on to say that the Petitioners had been voted out of office and were consequently disgruntled that the Respondents have replaced them. However, there was no affidavit evidence put before this Court relevant to such submissions. The submissions referred to the issuance of the notice by the Petitioners for the disposal of their shares. That notice had been served upon the Company who had acknowledged receipt and communicated acceptance of the transfer of the shares by the Petitioners. The Respondents brought to the attention of the Court *Article 9 (i)* of the *Articles of Association* which provided that a transfer notice should not be revocable except with the sanction of the Directors. They also referred to *Article 9 (iv)* which detailed that, on the application of either party, the auditor of the Company shall certify in writing this sum which, in his opinion, is the fair value of the shares and such sum should be deemed to be the fair value. Further, *Article 9 (v)* provided that:

> **"(v) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money, and the proposing transferor shall be deemed to have appointed any one Director or the Secretary of the Company as his agent to execute a transfer of the share to the purchasing member, and upon the execution of such transfer the Company shall hold the purchase money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the Register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person".**

6. The Respondents went on to submit that the purchase price for the shares had been received with from the purchasers of the Petitioners' shares and had been dispatched to them through their advocates. They admitted that the Petitioners return the purchase money to the Company which was still holding the same in trust for the Petitioners in accordance with *Article 9 (b)*. It was the clear submission of the Respondents, that by the time they filed on the Petition herein, the Petitioners had ceased being members of the Company and had no capacity or *locus standi* to institute the Petition. They went on to say that the Respondents had not come to court with clean hands. The dispute that they had put forward as to the fair value for their shares, could not be used as a ground to wind up the Company which is solvent. Indeed, the Petitioners had admitted, in the Replying Affidavit, that it was not their intention to wind up the Company. Indeed, they had been removed from the Register of Members as shareholders of the Company. The Respondents went on to say that if the Petitioners had wished to challenge the determination of the auditor in relation to the fair value for their shares, then such complaint could be raised in another forum but could not be established by means of a Winding-up Petition as filed in this Court. The gist of the Petition was not purely to wind up the Company but to put pressure on it amounting to an abuse of the court process. A Winding-up Petition should not be used for debt collection purposes.

7. The Respondents further submitted that there had been no compliance by the Petitioners with Rule 28 of the Companies Winding-up Rules. Further, there had been a breach of section 211 of the Companies Act under which the Winding-up Petition had been brought before Court. Under this provision of the Companies Act, only the Attorney General could move the Court upon a complaint by a member of a Company. The Respondents submitted that the Petitioners herein were not members of the Company neither was the Petition presented by the Attorney General. The Respondents concluded that the Petition was, in their opinion, brought with sheer malicious intention to blackmail the Company to pay out to the Petitioners unreasonable money demanded from it. The maliciousness and bad faith was illustrated by the fact that the Petitioners had included a deceased person in their Petition and that the 10th Petitioner had complained to this Court that his name appeared in the Petition without his knowledge, such being struck out by Court on 22nd July 2013. The Respondents submitted that the Petitioners had no alternative recourse to recover any money that they found to be due to them.
8. The Petitioners written submissions in relation to the Respondents' Notice of Motion dated 3rd May 2013 were filed alongside their submissions in support of their own application dated 18th June 2013. In a general statement, the submissions opened by detailing that all the contents, averments and assertions in support of the Notice of Motion dated 3rd May 2013 were devoid from the truth and a complete distortion of facts. The Petitioners had never intended to advertise the Petition. It was the manner of the draconian attitude which the Second to Eighth Respondents had adopted to tackle issues. The Petitioners submitted that that the prayer to have the Petition dismissed prematurely without both parties being allowed to be fully heard was ill-conceived and lacked basis. It is the right of each party to a Petition to be heard on merit in order to achieve justice. The Petitioners went on to say that they were oppressed shareholders of the Company who had a right to issue a notice for the transfer of shares in accordance with the Articles of Association of the Company. They emphasised that the Petitioners had detailed the price at which they were offering their shares which had not elicited a counter offer. Even if such a counter offer had been forthcoming, the Petitioners had reserved the right to turn the same down. They maintained that the cheques in their favour were hurriedly drawn and had been returned to the Company and thus leaving the Petitioners in their original position of being rightful shareholders of the Company. As such, they were still entitled to the privileges of membership. They had been condemned for moving to Court by way of a remedy to protect their interests. They had been denied dividends and bonuses relating to their shares and their public transport vehicles had been grounded as they had been denied access to the 1st Respondent's facilities across the country including car parks and petrol stations.
9. Prayer 2 of the Petition filed by the Petitioners herein on 1st November 2012 reads:

   "That the court do order remedies pursuant to section 211 of the Companies Act and that the Company be wound up."

   Section 211 (1) of the *Companies Act* reads as follows:

   "Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (2) of section 170, the Attorney-General may make an application to the court by petition for an order under this section."

As a result and in my opinion, the Respondents are quite wrong when they submitted that the Petitioners had no rights to bring the Petition herein before this Court. If indeed the Petitioners were members of the 1st Respondent Company and felt that the affairs of the same were being conducted in a manner oppressive to them, they had every right to bring the Petition before Court. However, to my mind the whole question before this Court is indeed whether the Petitioners, at the date upon which they brought their Petition, were members/ shareholders of the Company.

10. In every single circumstance where human beings deal with each other, there exists a set of rules by which persons abide. This is what sets the human race apart from the animal kingdom. Going back to the delivery of the Ten Commandments by Moses in the desert, man has abided by rules.

So it is with associations of persons in their dealings with one another. So far as the shareholders, directors, officials and employees of the Company are concerned, the set of rules by which they abide by are the Memorandum and Articles of Association of the company. Leaving aside Munyua Gaitho, Dickson Njau Kimani and Peter Nungu Njuguna who are no longer involved as Petitioners, the remaining 13 Petitioners have all issued notices to the 1st Respondent company under the provisions of *Article 9 (ii)* proposing to transfer their shares at a fair value. The relevant sub-Article reads:

> **"(ii) Except where the transfer is made pursuant to sub-Article (vi) or (viii) hereof, the person proposing to transfer any share (hereinafter called "the proposing transferor") shall give notice in writing (hereinafter called a "transfer notice") to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the share to any member of the Company (or person selected as aforesaid) willing to purchase the share (hereinafter called "the purchasing member") at the price so fixed or at the option of the purchasing member, at the fair value to be fixed by the Auditor in accordance with Sub-Article (iv) hereof. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of cash. A transfer notice shall not be revocable except with the sanction of the Directors".**

11. The letter dated 29th August 2012 from Messrs. Mahida & Maina, Advocates on behalf of 14 shareholders clearly gave notice that their clients have expressed their intention to dispose of their shares and to seek payment of their investments in the Company. The letter went on to say that the clients expected an early valuation of their shares ***"with a prompt and fair offer to purchase the same as it can always form a basis of negotiation that may lead to an agreed settlement"***. That letter was responded to by Messrs. Gathara Mahinda & Co. Advocates by letter dated 17th September 2012 in which the Company accepted instruction as to the disposal and transfer of the shares held in the company by Mahida & Maina's clients. The letter went on to say that the advocates were seeking their clients' instructions as regards to the fair value of the shares. The 2 letters were exhibited to the Supporting Affidavit to the Application as "RNK 1" and "RNK 2". The deponent of the Supporting Affidavit then annexed as "RNK 4", a copy of a letter from Kago Mukunya & Associates, Certified Public Accountants dated 14th September 2012 in which the firm adjudged a fair value for each members' share in the 1st Respondent company at Shs. 655,772/-. The Accountants stated that they had taken a fair value of the assets and the liabilities of the company to arrive at the net assets or equity. They went on to say that since the members/shareholders of the Company had equal shares, the equity was shared among the 50 members. The accountants attached to their said letter a copy of the valuation calculations. The accountants' said letter and valuation were forwarded to Messrs. Mahida & Maina Advocates under cover of a letter from Messrs. Gathara Mahinda & Co dated 24th September 2012 (exhibited as "RNK 5B") to the Affidavit in support of the Application. That letter also enclosed a number of banker's cheques covering the sale price of the Petitioners' shares totaling Shs. 3,879,772/-. The said advocates also gave an explanation as to why amounts differed in respect of the seven initial Petitioners having been paid out in terms of repayment of loans etc. The advocates detailed that the other seven shareholders would be paid out for their shares on or before 30th October 2012. However, no evidence was tendered before this Court to show whether either the said seven remaining shareholders were paid out or whether the Company is holding the purchase price for their shares in trust for them. However, what is clear from the letter dated 25th September 2012 from Messrs. Mahida & Maina, Advocates annexed to the Further Supporting Affidavit of the 1st Petitioner sworn on 18th July 2013, is the fact that the said banker's cheques were rejected as, in the opinion of the Petitioners, the amounts paid for their shares did not reflect a fair and true value of the 1st Respondent Company's shares. That letter called for a joint revaluation to be done as soon as possible to establish a fair and true value of the shares.
12. Obviously dissatisfied with the position that they found themselves in, the Petitioners filed their Petition herein on 1st November 2012. In the preamble to the Petition, the Petitioners maintained that their notice of disposal and transfer of their shares had been received with ill motive by the

directors of the Company. They accused those directors as having always played as obstacles and hindered the Petitioners exit from the Company. It was for these reasons that the Petitioners detailed, at paragraph 12 of their Petition, that it was for the best interest of each and every shareholder that the company be wound up by disposing of its assets, paying off any creditors and distributing the net proceeds among the shareholders. The circumstances in which a company may be wound up by the Court are detailed in **section 219** of the *Companies Act* which reads as follows:

"219. A company may be wound up by the court if –

a. **the company has by special resolution resolved that the company be wound up by the court;**

b. **default is made in delivering the statutory report to the registrar or in holding the statutory meeting;**

c. **the company does not commence its business within a year from its incorporation or suspends its business for a whole year;**

d. **the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;**

e. **the company is unable to pay its debts;**

f. **the court is of opinion that it is just and equitable that the company should be wound up;**

g. **in the case of a company incorporated outside Kenya and carrying on business in Kenya, winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business".**

From the above it does appear to this Court that the only circumstance pertaining to the matter before it would be sub paragraph (f) supra as it does not appear that the Company is unable to pay its debts.

13. It seems that the first issue for this Court's consideration is whether the affairs of the Company are being conducted in a manner oppressive to the Petitioners. One must ask the question as to what amounts to oppressive conduct of a company's business in the context of **section 211** of the *Companies Act*. As per my learned brother **Musinga J.** (as he then was) **In The Matter of Tatu City Ltd & Kofinaf Company Ltd (2013) eKLR**:

"The Supreme Court of India answered that question in S. P. Jain v Kalinga Tubes Ltd (1965) AIR 1535, (1965) SCR (2) 720 commenting on section 397 of the Indian Companies Act which is the equivalent of our section 211 of the Companies Act, the court held that for a petition under section 397 to succeed it is not enough to show that there is just and equitable cause for a winding-up of a company, though that must be shown as preliminary. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this require, that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members…… Further, the conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders could not be enough unless lack of confidence springs from the oppression of the minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of proprietary rights as a shareholder …….

Halsbury's Laws of England, 4th Edition Volume 7 (2) at page 1095, the learned author states that the words "*just and equitable*" in Company Law are a recognition of the fact that a limited liability

company is more than a "*mere judicial entity with a personality in law with its own: behind or among it there are individuals with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.*" The court must therefore subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are our unjust or inequitable."

In this matter before Court, the Petitioners direct their ire as against the Respondents in their capacity as directors of the Company not as shareholders thereof. As a result, I find no suggestion that there is oppression on a minority of shareholders (the Petitioners) by the majority of shareholders. In fact, I found 2 paragraphs of the Supporting Affidavit to the Petitioner's Notice of Motion dated 29th October 2012 to be illuminating. That Affidavit was sworn by the first Petitioner and reads at paragraphs 6 and 7 as follows:

> **"6. <u>THAT</u> it is after taking of office of the Directorship by the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents the management of the 1st Respondent has started deteriorating.**
>
> **7. <u>THAT</u> since their tenure in office began the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents have routinely sidelined, ignored and condemned us <u>for wanting to exit with the 1st Respondent</u>."** (Emphasis mine).

As I see it, the Petitioners' complaint as against the 2nd to 8th Respondents was not so much the manner in which they were operating the Company as its Board of Directors but the fact that, in their capacity as directors, they were not paying enough attention to the desire of the Petitioners to sell their shares and exit the company.

14. The principle of what amounts to "just and equitable" in winding up a company was clearly explained by the Court of Appeal in the case of **<u>Stephen R. Karunditu v Canvas Manufacturers Ltd</u> (1991) LLR 5698**. As **Muli JA** (as he then was) expressed it:

> **"The principle 'just and equitable', as I understand it does not entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations; considerations that are, of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."**

In my view, the equitable consideration in this matter was for the 2nd to 8th Respondents, as the Board of Directors of the Company, to attempt to ease the Petitioners out of the Company as a result of their being dissatisfied as to the manner in which the Board was managing the same. It may well be that the said 2nd to 8th Respondents acted somewhat hastily once they had received a notice from the Petitioners that the latter wished to dispose of their shares in the Company. However, in my opinion, those Respondents acted in accordance with the provisions of *Article 9 (ii)* supra. On being asked to put forward a fair price, the said Respondents referred the matter, quite rightly in my opinion, to the auditors of the Company in accordance with the provisions of that Article. In other words, they considered themselves bound by the rules in relation to the Company as spelt out in its Articles. However, those are all matters which will be gone into at the hearing of the Petition herein in due course. I have no doubt that the trial court will consider, in due course, the alternative remedy to winding up under **section 222** of the *Companies Act*. In this regard, I am conscious of the further finding of the Court of Appeal in the **<u>Karunditu</u>** case (supra):

> **"……. In his view, the appellant was denied participation in the operation and running of the company. This total exclusion from the affairs of the company was a painful sting. These matters could not be substantiated or otherwise in the Motion before the learned trial judge. The substance of the petition was anticipatory and the learned trial judge was wrong in**

constituting herself as the forum to try the Petition."

The Petitioners have clearly indicated in their Affidavit in reply to the Respondents' Notice of Motion dated 3rd May 2013 that they had no intention of advertising the Petition herein and as a result, I allow prayer No. 1 of that Notice of Motion. However as regards prayer No. 2, bearing in mind the dictum of the Court of Appeal as above, I am not prepared to strike out the Petition herein at this stage. In my view, the Petition must come for full hearing. In the circumstances, I make no order as to costs in respect of that Application.

15. As regards the Petitioners' Notice of Motion dated 18th of June 2013, such sought prayers to restrain the 2nd to 8th Respondents from holding and conducting the Special General Meeting or any Special General Meeting on behalf of the 1st Respondent company on 19th June 2013, or any other date. That Application was overcome by events as although this Court granted prayers 1 and 2 of the same, the meeting had already taken place by the time the Orders were extracted. However, the Court is still left with the necessity of determining as to whether to restrain the 2nd to 8th Respondents to hold any Special General Meeting at all. Further, the Application seeks an order that the Registrar of Companies do appoint a representative from his office to supervise such Special General Meetings of the Company that may be called. In the Supporting Affidavit to the Petitioners' said Notice of Motion, the 1st Petitioner would appear to be complaining not that the Meetings should not proceed but that he and his fellow Petitioners had not been invited to the same as the 2nd to 8th Respondents no longer considered them as shareholders. As deliberated upon above, the whole question of whether the Petitioners remain as shareholders of the Company will be heard and determined by this Court at the hearing of the Petition herein. In my view therefore, until such has been determined, the Petitioners are still shareholders of the Company and are thus entitled to receive notice of any Special General Meeting of the Company and attend the same.
16. Prayer 4 of the said Application requests of this Court, to be pleased to order a joint re-valuation of the 1st Respondent Company's assets as part of the Agenda of the Special General Meeting. In my view, this is not for this Court to so order. As was stated by **Lakha JA** in the case of **Murri v Murri & "K" Boat Services Ltd (2000) eKLR –**

"Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about the internal management of the company and the court does not interfere with the internal management of the company acting within its powers: see of the rule in Foss v Harbottle (1843) 2 Hare 261. Facts necessary to support intervention by the court, e.g. *ultra vires* or fraud have not been pleaded."

This is the same position in the case before this Court. The question of a revaluation of the Company's assets is an internal matter involving the management of the Company. It is not for this Court to step in to interfere in that regard. The Petitioners should take cognizance of the provisions of the Articles of Association of the Company for the matter to be raised at general meeting. Thus to sum up as regards the Petitioners' Notice of Motion dated 18th June 2013, this Court is not prepared to grant any of the prayers sought therein and the same stands dismissed with costs to the 2nd to 8th Respondents.

17. That leaves this Court to determine the Petitioners' Notice of Motion dated 10th September 2013. That Application sought two main prayers as follows:

> **"2. THAT pending the hearing and determination of this application the Honourable court be pleased to grant an interlocutory order restraining 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents whether by themselves, proxies, agents, employees and/or their servants from denying the petitioners by themselves, proxies, agents, employees and/or servants from accessing and/or using of the 1st respondent facilities, including the bus terminals, car parks and petrol stations among other facilities belonging to the 1st Respondent.**

3. THAT pending the hearing and determination of this application the Honourable court be pleased to order that 1st Respondent through 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents pay to the petitioners the Dividends and Bonuses for the year ending December 2011 and December 2012 which have been paid to the other shareholders except the petitioners".

As I have already found as above, the Petitioners must be considered as still being shareholders of the Company. As such, they are entitled to the privileges and perks, including dividends and bonuses that are currently enjoyed by the other shareholders of the Company. Accordingly, and to my mind, the Petitioners are entitled to Orders as requested of this Court in prayers 2 and 3 supra. It is so ordered. However, based on the rule in **Foss v Harbottle** as referred to above, this Court will not interfere as regards the internal workings and management of the Company and as a result, there shall be no order as to costs of the Application dated 10th September 2013.

DATED and delivered at Nairobi this 28th day of January, 2014.

J. B. HAVELOCK

JUDGE